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U.S. SC.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 14

**THE BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF JACKSON, IN THE STATE OF KAN-
SAS, ETC., PETITIONER,**

vs.

THE UNITED STATES OF AMERICA, ETC.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE TENTH CIRCUIT**

PETITION FOR CERTIORARI FILED MARCH 3, 1939.

CERTIORARI GRANTED APRIL 17, 1939.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Caption omitted]

[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS**

Law. No. 4135

UNITED STATES OF AMERICA (M-Ko-Quah-Wah, Allottee No. 193, an Incompetent Indian of the Prairie Band of Pottawatomis Indians), Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, a Body Politic and Quasi Public Corporation, Defendant

PETITION—Filed Dec. 23, 1936

The United States of America, by Summerfield S. Alexander, the United States Attorney for the District of Kansas, acting under the authority of the Attorney General of the United States, brings this action and, for its cause of action against the defendant, states:

1

At all times herein mentioned, one M-Ko-Quah-Wah was an allottee No. 193, and an incompetent Indian of the Prairie Band of the Pottawatomis Tribe. Her true post office address is Mayetta, Jackson County, Kansas. The defendant is a quasi public corporation, existing as a body politic under the laws of the State of Kansas. The plaintiff, the United States of America, is a corporate sovereign and body politic.

2

Heretofore and long prior to the year 1918 there was set aside for the use and benefit of such allottee, M-Ko-Quah-Wah, the following described real estate, lying and situated in Jackson County, Kansas, to-wit:

[fol. 2] The Northeast Quarter of Section Eleven (11), Township Eight (8) South, Range Fourteen (14) East of the Sixth P. M.

That under the treaties existing between the United States and such band of Indians, the land above described is not subject to taxation by the State and subdivision of the State, or municipal authorities, until such time as a trust relation between the United States and such band of Indians and the several allottees thereof should expire. That such trust relationship existed between the United States Government and such band of Indians and such allottees, from long prior to the year 1918 until the filing of this action, and such relationship continues to exist.

That on or about August 15, 1893, a trust patent was issued to M-Ko-Quah-Wah, Allottee No. 193 of such Prairie Band of Pottawatomí Indians, covering the above described land; that such patent specifically provided:

"Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887, Hereby Declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said M-Ko-Quah-Wah or, in case of her decease, for the sole use of her heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period, the United States will convey the same by patent to said Indian, or her heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period."

That before the expiration of the trust period specified in such patent which, by its terms, expired on August 15, 1918, a patent in fee was arbitrarily issued to M-Ko-Quah-Wah without her consent and without any application having been made by her for a patent, and on her express refusal to sign [fol. 3] application for a patent. That said patent, so arbitrarily issued, was dated April 17, 1918; Patent No. 625830, and on its face purported to convey the land in fee simple to the above allottee.

That on or about May 31, 1935, said fee simple patent No. 625830; so issued to such allottee No. 193 was cancelled, at the request of such patentee, under the authority of the Act of Congress approved February 26, 1927, 24 Stat. L. 1247; that such patent to such Indian was void and of no force or effect and was illegally issued in its inception.

That, as provided by the terms of the trust patent, above referred to, it was expressly provided that the President of the United States may, in his discretion, extend the trust period and, in pursuance to such provision of such trust patent and the provisions of law, on July 30, 1918, the President of the United States, did extend such trust provisions in the patent given to such allottee No. 193, for a period of ten years and thereafter and on April 16, 1928, the President of the United States, by executive order, further extended the trust period for an additional ten years.

That commencing with the year 1919 the defendant, the Board of County Commissioners of the County of Jackson, State of Kansas, illegally and wrongfully placed the above described real-estate upon the tax rolls of Jackson County, Kansas, and thereafter there was illegally assessed and collected from the said M-Ko-Quah-Wah, certain taxes, and that the following statement correctly indicates, in the designated column, the number of tax receipt, the year such taxes were paid, the date paid, the amount of taxes paid, and interest at the rate of 6% from the date each of such items was paid to September 1, 1936. That, as shown by said statement, there was due to the plaintiff for taxes paid to and including the year 1933, the sum of Nineteen Hundred Sixty-six Dollars and Ninety-six cents (\$1,966.96), and 6% interest thereon to September 1, 1936, from the date each item was paid in the sum of Eleven Hundred Six Dollars and Seventy-four Cents (\$1,106.74), making a grand total [fol. 4] of Three Thousand Seventy-three Dollars and Seventy cents (\$3,073.70). Said statement is as follows:

Total Amount of Taxes Paid by M-Ko-Quah-Wah, Potawatomi Allottee No. 193 for the NE/4 of Section 11, Town-

ship 8, Range 14, East 6th P. M. Kansas, containing 160 acres.

Official Receipts Nos.	Year of Taxes Paid	Date Paid	Amount Paid Actual Taxes	Interest at 6% to 9-1-36
5178	1919	9- 2-1920	\$ 147.01	\$ 136.80
5286	1920	12- 3-1920	80.24	62.00
5286	1920	6-20-1921	80.24	61.16
5363	1921	12-20-1921	76.73	64.01
5363	1921	6-20-1922	76.73	63.46
5201	1922	12-21-1922	64.11	49.92
5201	1922	6-20-1923	64.11	48.72
5459	1923	12-20-1923	64.25	47.68
5459	1923	6-20-1924	64.24	44.08
5323	1924	12-20-1924	62.08	47.76
5323	1924	6-15-1925	62.08	40.71
5403	1925	12-21-1925	67.23	43.38
5403	1925	6-20-1926	67.23	40.46
5523	1926	12-20-1926	68.07	38.42
5523	1926	6-18-1927	68.07	36.38
5462	1927	12-12-1927	68.90	34.42
5462	1927	6-20-1928	68.90	32.90
5373	1928	12-20-1928	70.62	31.15
5373	1928	6-20-1929	70.62	29.05
5415	1929	12-31-1929	69.41	26.25
5415	1929	6-26-1930	69.41	25.85
5656	1930	2- 5-1931	124.29	39.68
5213	1931	12-15-1931	123.47	33.21
5139	1932	1-17-1933	47.32	8.40
5139	1932	6-28-1933	47.32	8.40
2334	1933	2-12-1934	45.49	7.21
2334	1933	8-29-1934	48.79	5.28
			<hr/> \$1,966.96	<hr/> \$1,106.74

[fol. 5]

That each and every payment of taxes as indicated by said statement was illegally paid and received by the defendant, Jackson County, and that the defendant county is indebted to the plaintiff on each and every one of said items from the date they were respectively paid at the rate of 6% per annum until same is fully paid to the plaintiff, making a grand total due of Three Thousand Seventy-three Dollars and

Seventy Cents (\$3,073.70), which sum should draw interest at the rate of 6% per annum from September 1, 1936, until paid.

10

Plaintiff further states that heretofore application was made to the defendant for a refund of such taxes and such application has been refused.

Wherefore, plaintiff prays for judgment against the defendant in the sum of Three Thousand Seventy-three Dollars and Seventy Cents (\$3,073.70), together with 6% per annum interest thereon from September 1, 1936, until paid and for the cost of this action and all proper relief.

S. S. Alexander, United States Attorney, District of Kansas.

Duly sworn to by S. S. Alexander, jurat omitted in printing.

[fol. 6] IN UNITED STATES DISTRICT COURT

MOTION TO MAKE ADDITIONAL PARTIES—Filed March 1, 1937

Comes now the Defendant, The Board of County Commissioners of the County of Jackson, Kansas, and moves the Court for an Order directing that Lincoln Township in Jackson County, Kansas, and School District No. 97 in Lincoln Township in Jackson County, Kansas, and Mayetta Rural High School District No. 5 in Lincoln Township in Jackson County, Kansas, and the State of Kansas, be made party Defendants herein and directing that Summons issue herein to said additional parties as is provided by law, and as grounds for said Motion, this Defendant states: That Lincoln Township in Jackson County, Kansas, is now and has been at all times herein mentioned a duly organized Township in Jackson County, Kansas, whose officers are now as follows:

F. D. Cooney, Trustee.

Fred M. Baker, Clerk.

Lynn Keller, Treasurer.

That School District No. 97, is now and has been at all times herein mentioned a duly organized and existing School

District located in Lincoln Township in Jackson County, Kansas, whose officers are now the following persons:

John E. Walsh, Director.

Warner Coffin, Clerk.

C. B. Walker, Treasurer.

That Mayetta Rural High School District No. 5, is now and has been at all times herein mentioned, a duly organized [fol. 7] and existing Rural High School District located in Lincoln Township in Jackson County, Kansas, whose officers are now the following persons:

R. P. James, Director.

M. H. Lock, Clerk.

John E. Coleman, Treasurer.

That the State of Kansas is one of the States of the United States of America.

This Defendant further states that the action of the Plaintiff herein is one to recover Nineteen Hundred Sixty-six and 96/100 Dollars (\$1,966.96) for taxes paid to the County Treasurer of Jackson County, Kansas, upon the

Northeast Quarter of Section Eleven (11), Township Eight (8), Range Fourteen (14), East 6th P. M., Jackson County, Kansas.

for the years 1919 to 1933 inclusive: That the above described real estate is located in Jackson County in the State of Kansas, in said Lincoln Township, and said School District No. 97, aforesaid, and Mayetta Rural High School District No. 5, aforesaid: That this Defendant collected said sum of Nineteen Hundred Sixty-six and 96/100 Dollars (\$1,966.96), as taxes on said land aforesaid, during said period of time aforesaid, and out of said sum of \$1,966.96, so collected by this Defendant as aforesaid, this Defendant collected for and disbursed to the State of Kansas \$221.76, and collected for and disbursed to said Lincoln Township \$371.39, and collected for and disbursed to said School District No. 97, \$324.10, and collected for and disbursed to said Mayetta Rural High School District No. 5, \$546.25. A true and correct itemized statement showing the date, and the amount of the taxes paid to this Defendant during the period of time aforesaid and showing the date and amount

thereof disbursed by this Defendant to the State of Kansas, Lincoln Township, said School District No. 97, and said Mayetta Rural High School District No. 5, is hereto attached, marked "Exhibit A," and made a part hereof.

This Defendant further states that if this Defendant is liable to the Plaintiff in this action for said taxes in any amount, the State of Kansas, Lincoln Township, and said School District No. 97, and said Mayetta Rural High School [fol. 8] District No. 5, are liable to the Plaintiff for the proportionate share of said tax that was received from this Defendant by said taxing districts, and by reason of the premises the said State of Kansas, and the said Lincoln Township, School District No. 97 and the said Mayetta Rural High School District No. 5, in Jackson County, Kansas, are necessary parties to a complete determination of settlement of the question involved in this action.

The Board of County Commissioners of the County of Jackson, Kansas, by Warden L. Noe, County Attorney of Jackson County, Kansas; Floyd W. Hobbs of Counsel.

Service of a copy of the above and foregoing motion is hereby acknowledged this 1st day of March, 1937.

S. S. Alexander, Attorney for Plaintiff.

Statement from Records of Jackson County, Kansas, as Applying to Northeast Quarter of Section 11, T 8 S, R 14, Jackson County, Kansas.

Year	Valuation	Tax Receipt No.	State of Kansas	Jackson County	Mayetta R.H.S. #5	School D. #97	Lincoln Township	Date Paid	Tax	Penalty	Total Tax and Penalty
1919	7,400.00	5178	12.95	33.52	22.20	37.00	27.75	9-2-20	133.42	13.59	147.01
1920	8,680.00	do.	12.15	48.36	43.40	23.42	32.55	12-3-20	80.24		80.24
1921	8,680.00	5363	do.					6-20-21	80.24		80.24
1922	6,935.00	5201	19.40	32.07	43.40	26.04	32.55	12-20-21	76.73		76.73
1923	6,935.00	5459	11.50	28.99	34.67	27.05	26.01	6-20-22	76.73		76.73
1924	6,935.00	5459	16.11	30.90	34.67	20.81	26.01	12-1-22	64.11		64.11
1925	6,935.00	5323	16.00	32.23	38.14	11.79	26.01	6-20-23	64.11		64.11
1926	6,960.00	5403	18.58	31.62	38.14	20.11	26.01	12-20-24	64.25		64.25
1927	6,960.00	5523	18.09	34.17	38.28	19.49	26.10	6-15-25	62.08		62.08
1928	6,960.00	5462	19.07	34.86	38.28	19.49	26.10	12-21-25	67.23		67.23
1929	6,960.00	5373	14.62	32.49	41.76	26.24	26.10	6-20-26	68.07		68.07
1930	6,440.00	5415	14.13	32.50	41.76	25.33	26.10	6-18-27	68.06		68.06
1931	6,440.00	5655	12.88	31.61	38.64	24.09	17.07	12-12-27	68.90		68.90
1932	5,610.00	5139	12.82	30.98	34.00	24.47	21.70	6-20-28	68.90		68.90
1933	5,610.00	5139	11.11	26.81	30.85	5.72	19.64	12-20-29	70.61		70.61
1934	4,675.00	2334	12.35	25.82	28.06	13.05	11.69	6-20-30	70.60		70.60
1934 ft.	5,500.00	(taxes not paid)	221.76	487.53	546.25	824.70	371.39	12-31-29	69.91		69.91
		Totals,						6-26-30	69.91		69.91
								2-5-31	124.29		124.29
								12-15-31	123.97		123.97
								1-17-33	47.07		47.07
								6-28-33	47.06		47.06
								2-12-34	45.49		45.49
								8-29-34	45.48	1.51	46.99
									1.951.03	15.10	1,966.13

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER MAKING ADDITIONAL PARTIES DEFENDANT—Filed April
12, 1937

Now on the 12th day of April, 1937, the same being a regular day of the April, 1937, term of said Court, comes regularly on for hearing the motion of the Defendant, The Board of County Commissioners of Jackson County, Kansas, for an order directing that Lincoln Township in Jackson County, Kansas, and School District No. 97 in Jackson County, Kansas, and Mayetta Rural High School District No. 5 in Jackson County, Kansas, be made parties herein and for further order directing that summons be issued upon the said additional parties in the manner provided by law.

The Defendant, The Board of County Commissioners of Jackson County, Kansas, being present by its attorney, Warden L. Noe, and the Plaintiff being present by its attorney, Summerfield S. Alexander, and the Court being fully advised in the premises and after listening to the arguments of counsel, doth find that said motion should be granted and allowed as to Lincoln Township in Jackson County, Kansas; School District No. 97 in Jackson County, Kansas, and Mayetta Rural High School District No. 5 in Jackson County, Kansas.

It Is Therefore, By the Court, Considered, Ordered, Adjudged and Decreed, that Lincoln Township in Jackson County, Kansas, whose officers are now as follows:

F. D. Cooney, Trustee
Fred M. Baker, Clerk
Lynn Keller, Treasurer,

that School District No. 97, in Jackson County, Kansas, whose officers are now as follows:

John E. Walsh, Director
Warner Coffin, Clerk
C. B. Walker, Treasurer,

and that Mayetta Rural High School District No. 5, whose officers are now as follows:

R. P. James, Director
M. H. Lock, Clerk
John E. Coleman, Treasurer,

are necessary parties to a complete determination and settlement of the questions involved in this action, and it is the further order, judgment, and decree of the Court that the [fol. 11] Defendant cause summons to be issued to said additional parties Defendant in the manner provided by law, and it is the further order and judgment of the Court that the Defendant, The Board of County Commissioners of Jackson County, Kansas, be and hereby is granted thirty days from this date within which to plead. To all of which orders of the court sustaining motion of the defendant Board of County Commissioners to make additional parties defendant, the plaintiff in open court duly objected and excepted, and its exceptions were allowed.

Richard J. Hopkins, District Judge.

O. K. S. S. Alexander, Attorney for Plaintiff. O. K. Warden I. Noe, Holton, Kansas; O. K. F. W. Hobbs, Holton, Kansas, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO AMEND PETITION BY INTERLINEATION—Filed October 15, 1937

On this 15th day of October, A. D. 1937, came on for hearing the application of the plaintiff to amend its petition by interlineation.

It Is Ordered:

That the plaintiff be, and is hereby, granted permission to amend the petition to show the description of the real estate therein as being in Township 8 instead of in Township 28.

Richard J. Hopkins, Judge.

O. K. S. S. Alexander, United States Attorney, District of Kansas.

[fol. 12] IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 19, 1937

Come now the above-named defendants and for answer to the petition filed herein, deny each and every allegation in

said petition contained except as may be hereinafter specifically admitted.

Defendants admit all of the allegations of paragraph one of plaintiff's petition except that defendants deny that said M-Ko-Quah-Wah was an incompetent Indian at any of the times mentioned in said petition.

For further answer, said defendants allege that on or prior to 1919 the said Indian, M-Ko-Quah-Wah, was the owner in fee simple of the following described real estate in Jackson County, Kansas, to-wit:

The Northeast Quarter of Section Eleven (11), Township Twenty-eight (28) South, Range Fourteen (14) East of the Sixth Principal Meridian,

and has been the owner of said property ever since said time, and that during all of said times said land has been subject to taxation by the taxing bodies of Jackson County, Kansas.

Further answering, defendants allege that this action is barred by the three-year statute of limitations, as set out in G. S. 1935, 60-306, in paragraph two.

Further answering, defendants allege that this action is barred by the provisions of the cash basis law of the State of Kansas, as set out in G. S. 1935, 10-1101 to 10-1122, inclusive.

Wherefore, defendants pray that plaintiff take nothing by reason of this suit, and that defendants recover their costs herein expended, and have such other and further relief as to the court appears proper.

Warden L. Noe, Co. Atty., Jackson Co. Floyd W. Hobbs, J. L. Hunt, Attorneys for Defendants.
Wheeler, Brewster & Hunt, of Counsel.

[fol. 13] IN UNITED STATES DISTRICT COURT
REPLY—Filed October 5, 1937

The plaintiff for reply to the Answer of the defendants, and each of them, specifically denies each and every statement, allegation and denial set forth in such Answer inconsistent with the allegations of the plaintiff's Petition.

Wherefore, plaintiff prays for judgment as in its Petition set forth.

S. S. Alexander, United States Attorney, District of Kansas.

Authority is hereby granted to file within Reply out of time.

Dated this 4th day of October, 1937.

Richard J. Hopkins, Judge.

IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT—Filed December 17, 1937

Be It Remembered, that on this 16th day of December, A. D. 1937, this matter came on for hearing and for trial at Kansas City, Kansas. The plaintiff appeared by Summerfield S. Alexander, United States Attorney for the District of Kansas, and the defendants appeared by Warden L. Noe, County Attorney of Jackson County, Kansas, Floyd Hobbs of Holton, Kansas, and Wheeler, Brewster and Hunt of Topeka, Kansas.

Thereupon the respective parties announced that they were ready for trial, and a qualified jury was duly empaneled and sworn to try said case, the trial of said case extending over and onto December 17, 1937.

The respective parties introduced their evidence and rested.

At the close of the evidence the plaintiff in open court filed motion requesting the court to direct the jury to return a verdict in favor of the plaintiff and against the defendant The Board of County Commissioners of the County of Jackson, in the State of Kansas, for the full amount of the taxes, penalty and interest at 6% per annum from the date the respective items of taxes were paid, and which motion the court took under advisement.

Be It Remembered, that on December 17, 1937, the court overruled the motion of the plaintiff for a directed verdict, [fols. 14-16] and to which ruling the plaintiff then and there in open court duly objected and excepted, and its exceptions were allowed. Thereupon the case was argued to the jury, and the court instructed the jury as to the law in the case.

Thereupon the jury retired for deliberation, and on the same day, namely, December 17, 1937, returned into court their verdict finding in favor of the plaintiff and against the defendant The Board of County Commissioners of the County of Jackson, State of Kansas, in the sum of Three Thousand Two Hundred Seventy-seven Dollars and Forty-nine Cents (\$3,277.49).

Thereupon the plaintiff orally requested that judgment be rendered in favor of the plaintiff and against the defendant. The Board of County Commissioners of the County of Jackson, State of Kansas, on the verdict of the jury. ○

It is, Therefore, Ordered, Adjudged and Decreed by the Court, that the Plaintiff be and is hereby given judgment against the Board of County Commissioners of the County of Jackson, State of Kansas, in the sum of Three Thousand Two Hundred Seventy-seven Dollars and Forty-nine Cents (\$3,277.49) as of this 17th day of December, A. D. 1937, together with interest on any unpaid balance thereof at the rate of 6% per annum from such date until the same is fully paid, and for the costs of this action, as well as all accruing costs.

And to which orders and judgments of the court the defendants in open court duly objected and excepted, and their exceptions were allowed.

Richard J. Hopkins, Judge.

O. K. John L. Hunt, Geo. M. Brewster, Attorneys for Defendants.

O. K. S. S. Alexander, United States Attorney for the District of Kansas, Attorney for Plaintiff.

[Motion for new trial was filed on December 18, 1937, and order of the court overruling the motion was filed March 25, 1938.]

[fol. 17] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL, WITH ORDER ALLOWING SAME—Filed March 14, 1938.

To the Honorable Richard J. Hopkins, District Judge of the District Court of the United States for the District of Kansas:

The above-named defendants, The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, feeling themselves aggrieved by the verdict of the jury and judgment [fol. 18] entered thereon in the above-entitled action on the 17th day of December, 1937, do hereby appeal from said

verdict and judgment to the United States Circuit Court of Appeals, for the Tenth Circuit; that the errors upon which such appeal is based are contained in the assignment of errors filed herewith; and they pray that their appeal may be allowed and that a citation be issued in accordance with law and that a transcript of the record, proceedings and papers on which said judgment was entered, duly authenticated, be forwarded to the United States Circuit Court of Appeals for the Tenth Circuit, at Denver, Colorado.

And your petitioner desires that said appeal shall operate as a supersedeas, and therefore prays that an order be made fixing the amount of security which said defendants shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said appeal by the Circuit Court of Appeals.

Warden L. Noe, Floyd W. Hobbs, John L. Hunt, Geo.
M. Brewster, Attorneys for Defendants.

ALLOWANCE OF APPEAL—Filed in the District Court March
15, 1938

The above appeal as prayed for is hereby allowed this 15th day of March, 1938.

Richard J. Hopkins, United States District Judge.

[File endorsement omitted.]

Due service and receipt of copy of the within and foregoing Petition for Appeal, with Order allowing the same, is hereby acknowledged this 15 day of March, 1938.

Homer Davis, Asst. United States Attorney, District
of Kansas, Attorney for Plaintiff.

[fols. 19-20] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed March 14, 1938

Come now the Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, appellants in the above numbered and entitled cause, and in connection with and as a

part of their petition for appeal, assign the following errors which appellants aver occurred at the trial thereof and on which they rely to reverse the judgment as appears of record:

II

The District Court erred in refusing to give defendants' requested instruction No. 2, which was as follows:

"You are instructed that in no event is the plaintiff entitled to recover interest on any of the taxes paid. Therefore, if your verdict should be for the plaintiff you are instructed not to allow any interest."

To which refusal defendants properly excepted and the exception was by the court overruled.

[fol. 21]

VII

The District Court erred in refusing to give defendants' requested instruction No. 9, which was as follows:

"You are instructed that the Secretary of the Interior made an order that M-Ko-Quah-Wah was capable of managing her own affairs, which order has never been cancelled."

Said instruction, in connection with other instructions, was proper. To which refusal defendants properly excepted and exception was by the court overruled.

VIII

The District Court erred in instructing the jury that if the plaintiff was entitled to recover in the case, it had a right to recover all of the taxes, interest and penalties paid, together with interest thereon at the rate of six per cent per annum from the date of the respective payments to the date of the judgment in the case. To which instruction the defendants properly excepted and the exception was by the court overruled.

IX

The District Court erred in instructing the jury that M-Ko-Quah-Wah did not make an application for, or consent to, the issuance of a patent in fee covering the real estate

involved. To which instruction the defendants properly excepted and the exception was by the court overruled.

Wherefore, The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, pray that the judgment in said cause be reversed and that the cause be remanded with [fol. 22] instructions to the trial court as to further proceedings therein, and for such other and further relief as may be just in the premises.

Warden L. Noe, Floyd W. Hobbs, John L. Hunt,
Geo. M. Brewster, Attorneys for Defendants.

March 15, 1938. Served on Homer Davis, Asst. U. S. Atty.

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO FILE AMENDMENTS TO ASSIGNMENT
OF ERRORS—Filed May 11, 1938

Upon application of defendants, appellants in the above-entitled cause, and for good cause shown, it is hereby

Ordered, That the defendants, appellants in the above-entitled cause, be and they are hereby granted the right to amend the assignment of errors filed herein, and said defendants are granted fifteen days in which to file said amendments to the assignment of errors.

Dated this 11th day of May, 1938.

Richard J. Hopkins, District Judge.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S AMENDMENTS TO ASSIGNMENT OF ERRORS—Filed
May 23, 1938

Comes now The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, appellant in the above numbered and entitled cause, and in connection with and as a part of its petition for appeal, and in accordance with the order of this court dated May 11, 1938, does hereby file and designate the following amendments to the assignment of errors herein filed.

2. Paragraph VIII of said assignment of errors is hereby amended by inserting before the last sentence thereof the

language of the instructions given by the court as follows, to-wit:

“If the plaintiff has a right to recover in this case, then it has the right to recover all taxes, interests and penalties paid by M-Ko-Quah-Wah and by her husband and by the First National Bank of Mayetta, Kansas, or any agent or officer of such bank, if paid on behalf of the said M-Ko-Quah-Wah, together with interest thereon at the rate of six per cent per annum from the date of the respective payment until the date of your verdict in this case.”

[fol. 24] for the reason that the same is in violation of law and of the Ninth and Tenth Amendments to the Constitution of the United States.”

3. Paragraph IX of said assignment of errors is hereby amended by inserting before the last sentence of said assignment of errors the language of the instructions given by the court as follows, to-wit:

“I think the facts show, without any question, that said M-Ko-Quah-Wah did not make an application for, or consent to the issuance of a patent in fee covering the above described real estate.”

5. Said assignment of errors is further amended by adding thereto a paragraph XIII as follows, to-wit:

“XIII

The district court erred in instructing the jury as follows:

“The fact that the First National Bank of Mayetta, Kansas, or some officer or agent of such bank may have recorded the patent in fee, does not of itself show that the Indian, M-Ko-Quah-Wah, consented to have the land involved placed upon and taxed by the county authorities of Jackson County, nor does the fact that the Indian, M-Ko-Quah-Wah, or her husband or someone in her behalf has paid the taxes to the County Treasurer of the defendant [fol. 25] Jackson County, establish of itself that such taxes were paid voluntarily,

to which instruction the defendants properly excepted and the exception was by the court overruled.”

6. Said assignment of errors is further amended by adding thereto a paragraph numbered XIV as follows, to-wit:

"XIV

The district court erred in instructing the jury as follows:

"If the taxes paid by M-Ko-Quah-Wah were paid through a well founded apprehension that if she did not pay them, she would be compelled to pay a large amount of interest and penalties and eventually lose her land by a tax deed, then that payment under such circumstances would not be a voluntary payment. It is not necessary that the taxes should have been paid under protest in order to entitle the plaintiff to recover in this case. To constitute a voluntary payment of taxes, the party must have paid them with knowledge of her rights and paid them with a desire to pay them and not because of fear and apprehension of losing the land and of incurring interest and penalties if they were not so paid."

to which instruction the defendants properly excepted and the exception was by the court overruled."

Wherefore, The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation prays as in the original assignment of errors it has prayed.

Warden L. Noe, Floyd W. Hobbs, John L. Hunt,
Geo. M. Brewster, Attorneys for Defendant.

[fol. 26] [Bond on appeal in the sum of \$4,000, with appellant as principal and United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, approved by Richard J. Hopkins, District Judge, was filed June 9, 1938.]

[Citation, dated March 17, 1938, with acceptance of service by counsel for appellee, was filed in the District Court on March 19, 1938.]

IN UNITED STATES DISTRICT COURT

Bill of Exceptions

Be It Remembered, That on the 16th day of December, 1937, at the December 1937 term of the District Court of the United States for the District of Kansas, First Division, the above-entitled cause came on for trial.

Thereafter, a jury was impaneled and sworn, and the trial commenced on the 16th day of December, 1937, S. S. Alexander, United States District Attorney for the District of Kansas, and Homer Davis, Assistant United States District Attorney for the District of Kansas, appearing for plaintiff, and Warden L. Noe, County Attorney of Jackson County, Kansas, Floyd W. Hobbs, of Holton, Kansas, and Wheeler, Brewster & Hunt by John L. Hunt and George M. Brewster appearing for defendants.

Whereupon, plaintiff to sustain the issues on its part called H. E. Bruce as a witness in plaintiff's behalf, and said H. E. Bruce testified as follows:

Direct examination:

My name is H. E. Bruce. I live at Mayetta, in Jackson County, Kansas. I am superintendent of the Indian Agency at that place. It is known as the Pottawatomie Indian [fol. 27] Agency. I know M-Ko-Quah-Wah in connection with this agency. I have known her since I first became connected with the agency. She is in the courtroom. (Indicating.) Her name is on the rolls of the Pottawatomie Tribe of Indians. These Pottawatomie Indians that I refer to are usually called the Prairie Band of Pottawatomie Indians to identify them from other groups of the Pottawatomie Tribe in other sections of the country.

Thereupon, plaintiff introduced in evidence the following exhibits:

PLAINTIFF'S EXHIBIT 1

Plaintiff's Exhibit 1 includes the allotment rolls certified under date of May 31, 1893, of the Pottawatomie Indians showing that M-Ko-Quah-Wah is Allottee No. 193; that she is a female thirty-two years of age; that the description

of the land is the NE $\frac{1}{4}$ Section 11, Township 8, Range 14, 160 acres. Under the column marked "Remarks" she is designated as mother.

Plaintiff's Exhibit 1 also contains the following instrument:

(Trust Patent)

"The United States of America, To All To Whom These Presents Shall Come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated May 31, 1893, from the Acting Commissioner of Indian Affairs, approved by the Acting Secretary of the Interior June 2, 1893, whereby it appears that under the provisions of the Act of Congress approved February 8, 1887, (24 Stat. 388,) as amended by the Act of Congress of February 28, 1891, (26 Stats. 794) M-ko-quah-wah, an Indian of the Prairie band of Pottawatomies, has, been allotted the following-described land, viz.:

The northeast quarter of section eleven in Township eight South of Range fourteen east of the Sixth Principal Meridian in the State of Kansas, containing one hundred and sixty acres.

(Stamped thereon is the following: Fee Patent Issued: Letter No. 765362-18, Patent No. 625830. Fee Pat. #625830 Cancelled Under Act Feb. 26, 1927. See Sec. Letter 1605474. CCW 6-22-35.)

[fol. 28] Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887, Hereby Declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said M-Ko-Quah-Wah, or, in case of her decease, for the sole use of her heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or her heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period.

In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, this fifteenth day of August, in the year of our Lord one thousand eight hundred and ninety-three, and of the independence of the United States the one hundred and eighteenth.

By the President:

Grover Cleveland, by E. Macfarland, Ass't Secretary. L. O. C. Lamar, Recorder of the General Land Office." (L. S. "L. O.")

Plaintiff's Exhibit 1 also contains two Executive Orders, which are as follows:

"It is hereby ordered, under authority contained in the act of February 8, 1887 (24 Stat. 388-389), that the trust period on the allotments of the Prairie Band of Potawatomi Indians in Kansas, which trust period expires during the calendar year 1918, be, and is hereby extended for a period of ten years, with the exception of the following: (Exceptions do not cover land in question).

Woodrow Wilson.

The White House, 30 July, 1918.
(WWL)"

[fol. 29]

"Executive Order

It is hereby ordered under authority contained in the act of February 8, 1887, (24 Stat. 388-89), that the trust period on the allotments of the Prairie Band of Pottawatomi Indians in Kansas, which trust period expires during the calendar year 1928, be and is hereby extended for a period of ten years, with the exception of the following: (Exceptions do not cover land in question).

Calvin Coolidge.

The White House, April 16, 1928 (No. 4858).

Plaintiff's Exhibit 1 also contains the following Patent in Fee Report and Report of the Competency Commission:

"Patent in Fee Report

Name of Allottee M-Ko-Quah-Wah, Potawatomi Ks. Agency, Age 50 Degree of blood Full Indian. Married or

single Married, Allotment No. 193. Description NE/4 of Sec. 11, Twp. 8, Rge. 14, East of the 6th P. M. in Kansas. Area 160. Value by allottee \$3000.

Allotment was made under the act approved Feb. 28, 1891. (26 Stat. L., 794).

The trust period on this allotment expires August 15, 1918.

I hereby make application for a patent in fee covering the above-described land.

Witnesses to signature:

Pottawatomie Agency, Kansas, Dec. 29, 1917.

The Secretary of the Interior, Washington, D. C.

SIR:

We have the honor to report This 160 is pasture land, but the applicant and her husband have a well improved home on a deceased child's allotment. They have a fine house, a large barn, wells, windmills, concrete hog house and all other necessary farm buildings. The husband has an automobile, ten or fifteen head of horses and mules, a large herd of cattle including a bunch of fine thoroughbred Galloways. They are considered very competent people. [fol. 30] This allottee declined to sign an application, but is deemed to be fully competent to transact his own business without further Government supervision.

Julian H. Fleming. J. R. Wise.

Office of Indian Affairs

Washington, Feb. 7, 1918.

Respectfully forwarded to the Secretary of the Interior, with the recommendation that the Commissioner of the General Land Office be directed to issue a patent in fee to M-Ko-Quah-Wah, for the land above described, and that the issuance of this patent be made special. When issued it should be sent to this Office for delivery.

C. F. Hauke, Chief Clerk.

General Land Office

Washington, Feb. 11, 1918.

elv

There are no reservations or withdrawals covering the land hereinbefore described, and there are no reasons appearing in the records of the General Land Office why patent in fee should not be issued as recommended.

(Signed) C. M. Bruce, Assistant Commissioner.

Department of the Interior

Washington, Feb. 13, 1918.

4 It appears from the evidence submitted that M-Ko-quah-wah is competent to care for her own affairs in a degree that entitles her to a patent in fee covering the land described in her petition, and I therefore direct the Commissioner of the General Land Office to issue a patent in fee to her for the NE $\frac{1}{4}$ of Sec. 11, T. 8 S., R. 14 East of 6 P. M., in Kansas, and that the issuance of this patent be made special.

S. G. Hopkins, Assistant Secretary."

Exhibit I also contains the fee patent recommended by the Competency Commission, which fee patent reads as follows:

[fol. 31] "Fee Patent Recommended by Competency Commission

4-1060

765362

7930-18 I. O.

193

The United States of America, To all to whom these presents shall come, Greeting:

Whereas, an Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the claimant M-Ko-quah-wah, a Pottawatomie Indian, for the northeast quarter of Section Eleven in Township eight south of Range fourteen east of

the Sixth Principal Meridian, Kansas, containing one hundred sixty acres:

Cancelled by Order Dated May 31, 1935. Office of Indian Affairs. Received May 8, 1935. 24756.

Now know ye, That the United States of America, in consideration of the premises, Has Given and Granted, and by these presents Does Give and Grant, unto the said claimant and to the heirs of the said claimant the Land above described: To Have and to Hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever.

In Testimony Whereof, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the Seventeenth day of April, in the year of our Lord One thousand nine hundred and Eighteen and of the Independence of the United States the one hundred and forty-second.

By the President:

Woodrow Wilson, by M. P. Leroy, Secretary. L. T. C. Lamar, Recorder of the General Land Office.
(Seal.)

Recorded: Patent Number 625830."

[fol. 32] On the reverse side of the fee patent appears the following:

"Entered in the Transfer Record, in my office this 7th day of April, 1930.

Fee 10c.

C. F. Hurnl, Co. Clerk.

STATE OF KANSAS,
Jackson County, ss:

This instrument was filed for record on the 7th day of April, A. D. 1930, at 8:55 o'Clock A. M., and duly recorded in Book 68 on page 557. Fee \$1.10 Pd.

Ella Teer, Register of Deeds.

1st Nat'l Bk. Mayetta.

Original Compared with Record."

Plaintiff's Exhibit 1 also contains the following letter:

Address Only the Commissioner of Indian Affairs

Refer in Reply to the Following:

United States Department of the Interior, Office of Indian Affairs

Washington, May 20, 1935.

The Honorable The Secretary of the Interior.

MY DEAR MR. SECRETARY:

On April 17, 1918, fee patent No. 625830 was issued to M-ko-quah-wah, Potawatomi Indian, No. 193, for her allotment described as the NE $\frac{1}{4}$ of Sec. 11, Twp. 8 S., R. 14 E. 6th P. M., Kansas, containing 160 acres. The above fee patent was issued during the trust period without application by or consent of the allottee.

The records disclose that the patent was issued pursuant to the recommendation of the so-called competency commission, although the allottee declined to sign an application. The patentee now requests that the patent be cancelled and has submitted an abstract of title showing that the land has never been sold or mortgaged; and it is now clear and unencumbered except for taxes.

It is recommended that the fee patent be cancelled under authority of the act of Congress of February 26, 1927 (24 Stat. L., 1247).

Sincerely yours, John Collin, Commissioner.

[fol. 33] Department of the Interior, Office of the Secretary

Approved, May 31, 1935. by: Oscar L. Chapman, Assistant Secretary, and the papers returned to the Indian Office. Enclosure 647885"

Exhibit 1 also contains an order cancelling the fee simple patent, which is as follows:

United States Department of the Interior, Office of the Secretary

21316-35.

Washington, May 31, 1935.

Order Cancelling Fee Simple Patent

Whereas, on April 17, 1918, fee simple patent No. 625830 was issued to M-ko-quah-wah, Potawatomi Indian, No. 193,

for her allotment described as the N. E. $\frac{1}{4}$ of Sec. 11, Twp. 8 S., R. 14 E. 6th P. M., Kansas, containing 160 acres; and

Whereas, said fee simple patent was issued during the original trust period covering said allotment without application by or consent of the said M-ko-quah-wah for a fee simple patent:

Now, Therefore, acting under the authority conferred on me by the act of Congress of February 26, 1927 (24 Stat. L. 1247), I hereby cancel said fee simple patent covering the above described lands, and declare that pursuant to the terms of said statute, said lands have the same status as though such fee simple patent had never been issued; and the commissioner of the General Land Office is hereby directed to make appropriate notation and entry hereof on the records of his Office.

Oscar L. Chapman, Assistant Secretary."

AGREEMENT AS TO AMOUNT OF TAXES AND INTEREST PAID AND STATUS OF RECORD

It was agreed by counsel for both parties that the total amount of taxes paid on the land in question during the period of time between the issuance of the fee simple patent and its cancellation was \$1,966.13. It was further agreed by the counsel for both parties that interest at six per cent per annum on the item of taxes and penalties paid to December 6, 1937, amount to \$1,311.36. The following occurred with reference to the agreement as to the above amounts:

[fol. 34] "Mr. Brewster: * * * We object to the introduction of that evidence or any showing as to the amount of interest on the ground and for the reason that the same is incompetent, irrelevant and immaterial."

The Court: All right, that will be received.

Mr. Brewster: That is not all my objection.

The Court: All right.

Mr. Brewster (continuing): And that plaintiff is not entitled to interest, but if competent, relevant and material then the fact is as stated.

The Court: Yes, all right, I admit it.

Mr. Brewster: To which we except." (S. Tr. 17-18):

It was further agreed by and between the parties that the records in the office of the Register of Deeds of Jackson County, Kansas, do not show any mortgages or deeds as having been given on the property involved by M-Ko-Quah-Wah.

PLAINTIFF'S EXHIBIT 3

Plaintiff's Exhibit 3 consists of the tax receipts issued covering the land in controversy. Said tax receipts show the following information:

Number	Date of Receipt	Received of	Year
5178	9- 2-20	M-Ko-Wah-Quah	1919
5286	12- 3-20	Andrew Wabaunsee	1920
5363	12-20-21	Andrew Wabaunsee	1921
5201	12- 1-22	Andrew Wabaunsee	1922
5459	12-20-23	Andrew Wabaunsee	1923
5323	12-20-24	Andrew Wabaunsee	1924
5403	12-21-25	Andrew Wabaunsee	1925
5523	12-20-26	Andrew Wabaunsee	1926
5462	12-12-27	Andrew Wabaunsee	1927
5373	12-20-28	Andrew Wabaunsee	1928
5415	12-31-29	Andrew Wabaunsee	1929
5656	2- 5-31	Andrew Wabaunsee	1930
5213	12-15-31	M-ko-quah-wah	1931
5139	1-17-33	M-quo-quah-wah	1932
2334	2-12-34	Mrs. Andrew Wabaunsee	1933

[fol. 35] Tax Receipt 5373 has written thereon the following:

"Pd. under protest-acc't School Levy Dist. #97."

M-Ko-Quah-Wah Witness for Plaintiff

Thereupon, plaintiff called M-Ko-Quah-Wah as a witness in its behalf, and said M-Ko-Quah-Wah testified through an interpreter as follows:

Direct Examination:

My name is M-Ko-Quah Wah. I live in Mayetta, Kansas. I have lived there forty-five years on this land in

question. I am a full blood Potawatomi Indian. I know of a competency commission having been appointed in connection with Indian lands of the Potawatomi Reservation. Andrew Wabaunsee was my husband. We were married about fifty-five years ago. My husband and I lived on this land from about forty-five years ago all down through the years.

I talked with my husband concerning the payment of taxes about twenty years or more ago. When I received my patent I wanted to know what to do about this patent and the payment of the taxes. At that time I requested my husband to send that patent back to Washington. After that conversation I told him to go ahead and pay the taxes. I advised my husband to go ahead and pay the taxes for fear that if we didn't, we would lose the land. I had another talk with my husband about two years after I received the patent. During that conversation I asked my husband and one of the daughters what she would do regarding these taxes on the land. When the daughter would come to my place I wanted to know what to do about paying the taxes. I was yet weary regarding the payment of taxes.

My husband did the business for me. While my husband was able to work he farmed the land himself. After he became disabled, he hired the farming work done. We took in stock for pasture during the years 1918, 1919 and on up to the early part of the 20's. We took in more than forty head of stock outside of our own stock for pasture. We received \$1.50 per head per month for these large cattle and \$1.00 per head per month for yearlings and young stuff. This number of stock was substantially taken in for 1918 and subsequent years. My husband, Andrew Wabaunsee, [fol. 36] received the money for the stock pastured. My husband looked after the business with reference to collecting rentals and renting the land during those years. I never collected the rents for the pasture myself. I requested my husband to look after the business for me and collecting the rents was part of the work that he was to do.

(Here ensued an argument with reference to what the tax receipts showed. The following occurred:

The Court: Don't these tax receipts show the taxes paid by her? Mr. Alexander: No by the husband, all but three or four.

The Court: Part of them show paid by her.

Mr. Alexander: Three or four, the majority is in the husband's name, yes. (Tr. 20-21).

M-Ko-Quah-Wah continued as follows:

I do not sign my name. My husband died about eight years ago. I made arrangements that Mr. Cooney, the banker at the First National Bank at Mayetta, pay the taxes after my husband died. I do not know whether or not there was a bank account in my name. We would have this livestock for pasture about five months of the year during the summer season. We took stock for pasture from 1918 on up to 1933. This was true when we lived on the land as well as when we were not living on the land. We lived on this land until my husband's death. I recall that we moved to town just before he died—a year or so before he died. About a year ago I moved back on the land. Fear of losing the land is why I made my husband—suggested to my husband—that the taxes be paid. I had this fear all during the years that I paid the taxes on this land. I never signed any papers or applications or documents or wrote any letters at any time requesting a patent to this land.

There was no cross-examination.

Statutes Offered in Evidence

At this time plaintiff offered in evidence portions of the statutes of the State of Kansas, as follows:

G. S. 1935, 79-2301, G. S. 1935, 79-2302, G. S. 1935, 79-2311, G. S. 1935, 79-2319, G. S. 1935, 79-2322, G. S. 1935, [fol. 37] 79-2320, G. S. 1935, 79-2401, G. S. 1935, 79-2411, G. S. 1935, 79-2501, G. S. 1935, 79-2505, G. S. 1935, 79-2306. (Tr. 30.)

W. A. Cooney, Witness for Plaintiff

Thereupon, plaintiff called W. A. Cooney as a witness in its behalf, and said W. A. Cooney testified as follows:

Mr. Name is W. A. Cooney. I lived at Mayetta, Kansas. I have lived there thirty or forty years. I am cashier of the First National Bank at Mayetta. I have been cashier for thirty years.

I know M-Ko-Quah-Wah. I have known her about thirty years. I knew her husband, Andrew Wabaunsee, about

forty years. They were customers of the bank. Andrew Wabaunsee came to the bank as a regular customer in the ordinary transactions of business. At times he would consult with me and advised with me as his banker in connection with business transactions. I had no business transaction with M-Ko-Quah-Wah during her husband's lifetime. She may have been in the bank but not in the transaction of business. Andrew Wabaunsee transacted the business with me in the bank. There was a bank account carried there by Andrew Wabaunsee. There was no bank account carried during his lifetime by his wife. Andrew Wabaunsee died about 1927. I am not positive. I was the administrator of Andrew Wabaunsee's estate. The First National Bank of Mayetta is the institution referred to on the back of the fee patent, part of Government's Exhibit 1. The fee patent was recorded by the Register of Deeds and sent to the bank. I don't remember the incident but on the face of it the bank must have had the fee patent. I think I was administrator after the patent was recorded. The fee for recording the patent was paid by the bank for the Wabaunsees for the Wabaunsee account. Sometime after the death of Andrew Wabaunsee there was an administrator's account opened. I was the administrator. The estate has been closed. The account was transferred to W. A. Cooney as administrator of Andrew Wabaunsee. It shows on the sheet that this transfer was made June 11, 1930. The administrator's account was closed June 2, 1932. An account was opened for M-Ko-Quah-Wah November 6, 1930. That was the first time an account was in her name. Andrew Wabaunsee could not write. He signed his name by mark or authorized [fol. 38] someone to sign his name. After Andrew Wabaunsee died I had a talk with his widow concerning the subject of taxes or handling of property. It was not very long after her husband's death. The substance of the talk was that she wished us to attend to the payment of taxes and business the same way as we had for her husband.

Cross-examination.

On cross-examination by counsel for the defendants, this witness testified as follows:

As administrator of the estate of Andrew Wabaunsee, I paid taxes covering the property involved in this controversy. I paid two and a half years' taxes and included

those in my report as executor and administrator. I paid taxes on this property for the last half of 1929 out of the estate of Andrew Wabaunsee. I know that I paid them. I did pay them. I know that I paid the taxes on this land out of the estate of Andrew Wabaunsee for the year 1930. I included that in my reports. I think I paid the taxes on this property for the year 1931 out of the estate of Andrew Wabaunsee. During Andrew Wabaunsee's lifetime I always paid the taxes out of the account in the name of Andrew Wabaunsee. I do not remember how we happened to record the patent. During her husband's lifetime I never had any business with M-Ko-Quah-Wah, nor to my knowledge did she do any business in the bank. I never saw her make a deposit. I made a return of the balance shown in the inventory.

Redirect examination:

On redirect examination, Mr. Cooney testified as follows:

During the year 1918 until the time they moved to Mayetta, M-Ko-Quah-Wah and her husband, Andrew Wabaunsee, lived on the 160-acre farm in question. They lived there from the time I first knew them until they moved to Mayetta. They moved to Mayetta a short time before his death.

Alice Battese, Witness for Plaintiff

Thereupon, plaintiff called Alice Battese as a witness in its behalf, and said Alice Battese testified as follows:

My name is Alice Battese. M-Ko-Quah-Wah is my mother. I am fifty-five years old. I know the land in question in this lawsuit. I lived on that land. I must have been about eight or nine years old when I first went to this land to live. My mother lived on the land about thirty-five years. They lived on the land until moving to Mayetta. They moved to Mayetta in March, 1927. Andrew Wabaunsee is my step-father. He died June 3, 1929. My mother and step-father were living in town at the time. Last February of this year my mother returned to this land. My stepfather farmed the land as long as he was able, and when he got sick he got someone to help him. They took stock in every spring. I would say about forty head. They would be pastured during the summer season. They got \$1.50 per head per month for the big cattle and

around \$1.00 for the yearlings. My mother cannot talk English. My stepfather was an Indian and he could not read or write.

I heard a conversation between my stepfather and my mother relative to the payment of taxes. This was just about the time the competency commission was sent from Washington when they went around to different homes on the reservation to see if they were competent to pay taxes. This was along about 1918. I heard directions given by my mother to my stepfather relative to taxes. My mother said to my stepfather that he ought to pay the taxes. They didn't want to lose the land. She wanted to know if there could be something done about turning the patent back to Washington. When she received the patent she was afraid they would lose it if they did not pay the taxes, and she told my stepfather to go ahead and pay it when it was time to pay taxes. She always told my stepfather to handle her affairs. She said she wanted the patent sent back to Washington. I heard several talks about taxes between my mother and stepfather. They were all about the same nature. My stepfather, Andrew Wabaunsee, looked after the business. My stepfather had no land or property at the time my mother got this land or along in there in those years. He did not get any allotment of land up there. I do not know of my stepfather owning any land in Kansas or elsewhere at the time of his marriage to my mother. He owned some land which he inherited from one of the girls. He inherited a half interest in an interest of my sister's at one time. It was after she died. My sister died in 1901. I do not know of his ever owning any other land except this. I have two half sisters living now and five have died. They were children of Andrew Wabaunsee and [fol. 40] my mother. I never knew of my mother carrying a bank account in her own name. Andrew Wabaunsee had no other business occupation than farming this land.

► Cross-examination

On cross-examination by counsel for defendants, this witness testified as follows:

All of this land was in pasture except about twenty-eight acres, and then later on ten acres were broken up so there were about forty acres in cultivation. In 1918 they always called it twenty-eight acres in cultivation. They increased the acreage under cultivation about three years ago. I do

not know how many acres are necessary to pasture and feed one head of cattle. He rented land from my sister before she died. He farmed it before she died. She was just twelve years old when she died.

Thereupon, plaintiff rested.

Thereupon, defendants to maintain the issues on their part introduced the following exhibits:

DEFENDANTS' EXHIBIT "A"

Defendants' Exhibit A is a certified copy of the account and inventory in the Estate of Andrew Wabaunsee, deceased. Defendants offered only the inventory, which shows in part as follows:

	Appraised Value
Household Goods	\$ 75.00
Ford Automobile	325.00
Certif. Deposit of First Nat'l Bank, Mayetta, Kansas dated May 7, 1930	2,000.00
Certif. Deposit of Exch. St. Bk., Mayetta (closed), dated Oct. 29, 1929	110.00
4th Lib. Bonds U. S., dated Oct. 24, 1917	200.00
Checking Acct. 1st Nat'l Bank	415.00
Checking Acct. Exch. St. Bank	3.00
Lot 19, Harrington's Add., Third Street, May- etta, Jackson County, Kansas	1,000.00
Total Appraised Value	\$4,128.00

This inventory was subscribed and sworn to by W. A. Cooney, Administrator of the Estate of Andrew Wabaunsee, [fol. 41] deceased, on June 28, 1930, before H. D. Jones, a Notary Public. This exhibit was properly authenticated.

On such exhibit being offered in evidence, the plaintiff made the following objection:

"The Government objects as incompetent, irrelevant and immaterial, only tending to encumber the record. Any material matters in that have already been brought out. We think so at least, and we are objecting to it as a whole.

Mr. Brewster: We will offer only the inventory.

The Court: Just the inventory, yes.

Mr. Alexander: That isn't binding upon anyone in this case.

The Court: It will be received.

Mr. Alexander: Exception please." (Tr. 64.)

DEFENDANTS' EXHIBIT "B"

Defendants' Exhibit B is a certified copy of a fee patent issued to M-Ko-Quah-Wah covering property other than the 160 acres involved in this lawsuit. This exhibit shows as follows:

"Patent

958353.

92197-20

237

4-1071

The United States of America

To All To Whom These Presents Shall Come, Greeting:

Whereas, An Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the Claimant M ko quah wah, heir of Pis Che dwi, a Prairie Pottawatomie Indian, for the North half of the Southeast quarter of the Southwest quarter of Section seventeen in Township nine south of Range fourteen east of the Sixth Principal Meridian, Kansas, containing twenty acres.

Now Know Ye, That the United States of America, in consideration of the premises, Has Given and Granted, and by these presents, Does Give and Grant, unto the said claimant and to the heirs of the said claimant the Land above described: To Have and To Hold the Same, together with all the rights, privileges, immunities and appurtenances, of whatever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant, forever. The land covered by this patent is not liable for any debt contracted prior to this date, as provided by Section 5 of the Act of February 8, 1887, (24 Stat. 388, 389), and the amendatory Acts of May 8, 1906 (34 Stat. 182), and June 21, 1906 (34 Stat. 325, 327).

In Testimony Whereof, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, in the District of Columbia, the Eighteenth day of January in the Year of Our Lord one thousand nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-fifth.

By The President :

Woodrow Wilson, by M. P. Leroy, Secretary. L. Q.
C. Lanier, Recorder of the General Land Office.
(Seal.)

Recorded Patent Number : 790,644.

This instrument was filed for record on the 4th day of March, A. D. 1930, at 11:30 A. M.

Ella Teer, Register of Deeds.

STATE OF KANSAS,

County of Jackson, KS :

I, Floss Hasson, Register of Deeds in and for the above-named County and State, do hereby certify that the above and foregoing is a true and correct copy of a Patent as is found recorded in Volume 68 of Deeds at page 553, in the office of register of deeds in above-named county.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on this 9th day of December, A. D. 1937.

(Signed) Floss Hasson, Register of Deeds. (Seal.)"

[fol. 43] Frances Fletcher, Witness for Plaintiff

Thereupon, defendants called as a witness MRS. FRANCES FLETCHER, who being duly sworn testified as follows :

My name is Frances Fletcher. I am deputy county treasurer of Jackson County. In the spring of 1919 to January, 1923, I was deputy county clerk. The land in question was on the tax rolls in the spring of 1919.

Thereupon, defendants closed their case. The foregoing was all the evidence introduced on the trial of this cause.

PLAINTIFF'S MOTION FOR JUDGMENT

Whereupon, the plaintiff moved the court for judgment at the close of all of the evidence, which motion omitting caption and formal parts is as follows:

"Comes now the plaintiff, at the close of all the evidence, and moves the court to instruct the jury to return a verdict in favor of the plaintiff and against the defendant; the Board of County Commissioners of the County of Jackson, State of Kansas.

(a) For the full amount of the taxes and penalties paid by and on behalf of M-Ko-Quah-Wah, in the sum of \$1,966.13; and,

(b) For interest at the rate of six per cent per annum on each of the items of taxes paid from the date they were paid unto this date, stipulated to be \$1,311.36."

Whereupon, an adjournment was taken until December 17, 1937, at ten o'clock A. M. On December 17, 1937, at ten o'clock A. M., the following proceedings were had, to-wit:

The court overruled the plaintiff's motion to instruct the jury to return a verdict in favor of plaintiff and against the defendant, The Board of County Commissioners.

INSTRUCTIONS GIVEN BY THE COURT

Thereupon, the court read its instructions to the jury as follows:

"The Court: Gentlemen of the jury, it now becomes my duty to tell you what the law of this case is that shall govern you in your deliberations and in arriving at a determination [fol. 44] of the fact or facts which you are called upon to determine. The petition filed by the Government in this case says substantially, the United States of America for its cause of action against the defendant, that is, the Board of County Commissioners and the county, states that at all times mentioned one M-Ko-Quah-Wah was an allottee No. 193, and an incompetent Indian of the Prairie Band of the Pottawatamie tribe; that the defendant, that is the County Commissioners or the board of County Commissioners is a

quasi-public corporation existing as a body politic, etc.; under the laws of the State of Kansas; that the plaintiff, the United States of America, is a corporate sovereign and body politic; that long prior to the year 1918, there was set aside for the use and benefit of such allottee, M-Ko-Quah-Wah, the following described real estate lying and situated in Jackson County, Kansas, and then it describes the particular tract; that under the treaty existing between the United States and such band of Indians, the land above described is not subject to taxation by the state and subdivisions of the state or municipal authorities until such time as a trust relation between the United States and such band of Indians and the several allottees thereof should expire; that such trust relationship existed between the United States Government and such band of Indians and such allottees from long prior to the year 1918 until the filing of this action, and that such relationship continues to exist; that on or about the 15th of August, 1893, a trust patent was issued to M-Ko-Quah-Wah, the allottee of such Prairie Band of Pottawatomie Indians, covering the above-described land; that the patent specifically provided among other things that the United States, in consideration of the premises and in accordance with other laws, for the period does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of said M-Ko-Quah-Wah, or in case of her decease, for the sole use of her heirs, etc.; that before the expiration of the trust period specified in such patent, which by its terms expires August 15, 1918, a patent in fee was arbitrarily issued to M-Ko-Quah-Wah without her consent and without any application having been made by her for a patent, and on her express refusal to sign the application for a patent; that the patent so arbitrarily issued was dated April 17, 1918, and on its face purported to convey the land in fee simple to her; that on or about May 31, 1935, the said fee simple patent so issued to such allottee was [fol. 45] cancelled at the request of such patentee under the authority of the Act of Congress approved February 26, 1927; that such patent to such Indian was void and of no force or effect and was illegally issued in its inception; that as provided by the terms of the trust patent above referred to, it was expressly provided that the President of the United States may in his discretion extend the trust period, and in pursuance of such provision of the trust patent and the provisions of Law of July 30, 1918, the President of the

United States did extend such trust provisions of the patent for a period of ten years, and thereafter on April 16, 1928, the President of the United States, by Executive Order, further extended the trust period for an additional ten years; that commencing with the year 1919, the defendant Board of County Commissioners of the County of Jackson, wrongfully placed the above-described real estate upon the tax rolls of Jackson County, and thereafter there was illegally assessed and collected from the said M-Ko-Quah-Wah certain taxes and that the following statement, and it is set out here, correctly indicates the number of the tax receipts and the years such taxes were paid, the amounts thereof, etc.; that as shown by such statement there was due to the plaintiff for taxes paid to and including the year 1933, the sum of \$1,966.00 and interest thereon to September 1, 1936, from the date each item was paid in the sum of \$1,106.74. It is stipulated between the parties that the amount of tax and penalty paid was \$1,966.13. That the interest at six per cent per annum on the items of taxes and penalties paid to the date of December 6, 1937, was \$1,311.36. That is the amount of interest and taxes. The Government alleges here that each and every payment of taxes as indicated by the statement, was illegally paid and received by the defendant County of Jackson, and that the defendant county is indebted to the plaintiff on each and every one of said items from the date they were respectively paid, etc. The plaintiff further states that application was made to the defendant for a refund of said taxes and such application has been rejected, wherefore, the plaintiff prays judgment for the amount of the taxes and interest.

"In answer to this petition the defendant has filed an answer in which it denies each and every allegation in the petition, except as specifically admitted in its answer. It admits the plaintiff's petition first that it is a body politic as alleged and that the United States is; denies that M-Ko-Quah-Wah was an incompetent Indian at any of the times mentioned; [fol. 46] alleges that the said Indian woman, M-Ko-Quah-Wah, was the owner in fee simple of the following real estate, and then it describes the said land, and that she has been the owner of said property ever since the time of the issuance of this patent. Further answering, the defendants allege that the action is barred by the three year statute of limitation and also that the action is barred by the pro-

visions of certain statutes of Kansas, and pray that the plaintiff take nothing by reason of this suit and that defendants recover their costs herein. To this answer, then, the Government has filed a reply in which it denies all of the allegations of the answer that are inconsistent with the allegations of its petition.

“These papers we call the pleadings. The petition, the answer and the reply do not constitute any evidence in the case. They are the written allegations of the parties as to what their claims are. The burden of proof is upon the plaintiff. It is for it to prove its cause of action by a preponderance of evidence. A preponderance of evidence is simply meant the greater weight of the evidence. When you have weighed all the evidence upon any disputed question of fact, and there are only one or two, perhaps only one disputed question of fact here for your consideration, when as I say, you have weighed that dispute, if you find there is a greater weight on the side of the plaintiff than on that of the defendants, the plaintiff has proven its contention by a preponderance of the evidence, and your verdict should be for it, that is, for the plaintiff, upon the particular issue in question. If you find the evidence equally balanced, or if you find there is not a greater weight on the side of the plaintiff on that issue than on that of the defendant, then the plaintiff has failed to prove its contention by a preponderance of the evidence, and upon that question or issue, your decision would be for the defendant.

“Now the United States Government on November 15, 1861, on the Kansas River, entered into a treaty with the Prairie band of Pottawatomie Indians by the terms of which it was provided that lands allotted to the members of that band of the Pottawatomie Indians shall be exempt from levy of taxation and sale until otherwise provided by law. This being a treaty between the Government and the Indians, no state may tax the land allotted to the Indian without his consent. The Indians depend largely upon fair treatment of [fol. 47] the Federal Government in maintaining its treaty obligation with such Indians, and the Government is charged with the duty of protecting and caring for the Indian race and the members of such race.

“This suit is brought by the United States in its sovereign capacity, and because the United States is charged with the duty of seeing that its treaties made with the Indian Nation,

such as the Pottawatomie Nation or tribe of Indians, are carried out. The treaty made and duly approved by the President and confirmed by the senate is binding upon all of the states of the Union and no state or sub-agency thereof has the right to change or violate the terms of such treaty.

"The evidence in this case shows that M-Ko-Quah-Wah is a full blooded Pottawatomie Indian. That she does not understand the English Language; that she is of the Prairie band of the Pottawatomie Indians; that she has never severed her tribal connections with such band; that on or about June 2, 1893, M-Ko-Quah-Wah was placed upon the schedule of allotments as allottee No. 193 of the Prairie Band of Pottawatomie Indians, and there was allotted to her on such registration rolls, the northeast quarter of section 11, township—well now, it is the land involved in this case, in Jackson County, Kansas. That on August 15, 1893, a trust patent was issued to her by the President of the United States to the land involved herein, wherein it was declared that it will hold the land thus allotted for a period of twenty-five years in trust for the sole use and benefit of said M-Ko-Quah-Wah or in case of her decease, for the sole use of her heirs according to the law of the state and territory where such land was located and that at the expiration of said patent, the United States will convey the same, or at the expiration of said trust agreement, the United States will convey the same by patent to said Indian, or her heirs in fee, discharged of said trust and free of all charges or incumbrances whatsoever, provided that the President of the United States may in his discretion extend such period; that thereafter on July 30, 1918, by executive order of the President of the United States, the trust patent was extended for a period of ten years, and thereafter on April 16, 1928, the President of the United States extended the trust period for an additional ten years. The result of such extension is that the trust period specified in the trust deed has not expired. I think the facts show, without any question, that said M-Ko-Quah-Wah did not make an application for, or consent to the issuance of a patent in fee covering the above-described real estate. Irrespective of the fact that the said M-Ko-Quah-Wah did not make an application for a patent in fee, the President of the United States on April 17, 1918, issued a patent in fee to her, a Pottawatomie Indian, for the land above described; that on May 31, 1936, pursuant to the Act of Congress of February 27, 1927, the fee patent issued

M-Ko-Quah-Wah, a Pottawatomie Indian, on the land above described, was cancelled by the Department of the Interior and that the land involved has never been mortgaged or encumbered or sold in whole or in part by the said M-Ko-Quah-Wah.

"The evidence in this case also discloses that the administrator of the estate of Andrew Waubaunsee may have paid the taxes for the last half of 1929 and 1930 and 1931.

"Now, if the funds in the hands of the administrator were accumulated or largely accumulated from the income from the land in question, M-Ko-Quah-Wah being his wife, a widow, and entitled under the law to have the property, then the payment of such taxes by the administrator would amount to no more than an assignment on behalf of the widow and under such circumstances the United States would be entitled to recover for such taxes so paid by the administrator. The fact that the First National Bank of Mayetta, Kansas, or some officer or agent of such bank may have recorded the patent in fee, does not of itself show that the Indian, M-Ko-Quah-Wah, consented to have the land involved placed upon and taxed by the county authorities of Jackson County, nor does the fact that the Indian, M-Ko-Quah-Wah, or her husband or someone in her behalf has paid the taxes to the County Treasurer of the defendant Jackson County, establish of itself that such taxes were paid voluntarily. If the plaintiff has a right to recover in this case, then it has the right to recover all taxes, interests and penalties paid by M-Ko-Quah-Wah and by her husband and by the First National Bank of Mayetta, Kansas, or any agent or officer of such bank, if paid on behalf of the said M-Ko-Quah-Wah, together with interest thereon at the rate of six per cent per annum from the date of the respective payment until the date of your verdict in this case. Your verdict can only be as against the defendant, The Board of County Commissioners of Jackson County in the State of Kansas. The statutes of the State of Kansas provide that [fol. 49] interest should be charged on delinquent taxes and if taxes continue delinquent, the land may, in the course of time, be sold for taxes and thereafter that the County Clerk shall issue a tax deed if redemption be not made. It is not necessary here to detail the Kansas Statutes.

"If the jury finds that these taxes were paid by M-Ko-Quah-Wah and paid in her behalf out of her funds; and such taxes were not voluntarily paid, then as to all such

taxes, penalties and interest, the plaintiff would be entitled to recover.

"If the taxes paid by M-Ko-Quah-Wah were paid through a well founded apprehension that if she did not pay them, she would be compelled to pay a large amount of interest and penalties and eventually lose her land by a tax deed, then that payment under such circumstances would not be a voluntary payment. It is not necessary that the taxes should have been paid under protest in order to entitle the plaintiff to recover in this case. To constitute a voluntary payment of taxes, the party must have paid them with knowledge of her rights and paid them with a desire to pay them and not because of fear and apprehension of losing the land and of incurring interest and penalties if they were not so paid.

"If you find from the evidence that the taxes sought to be recovered by the plaintiff were paid voluntarily, then in that event your verdict would be for the defendants for the amount that was paid voluntarily.

"If you find from the evidence that some person or parties, other than M-Ko-Quah-Wah, paid said taxes out of money not belonging to M-Ko-Quah-Wah and not repaid to such person or parties by M-Ko-Quah-Wah, then in and in that event, the plaintiff is not entitled to recover those particular items and taxes.

"You gentlemen are the sole judges of the credibility of the witnesses and of the weight and value to be given their testimony. In passing upon the credibility of any witness, you have the right to take into consideration his conduct and demeanor upon the witness stand, his interest, if any, upon the outcome of the case, the reasonableness or unreasonableness of his testimony, and the probability or lack of probability and the opportunity which the witness had to observe the facts concerning which he has given testimony, the consistency of statements made by him on the witness stand with statements made by him at other [fol. 50] times and places. All these things you will take into consideration in passing upon the credibility of any witness. If you believe that any witness has wilfully sworn falsely to any material facts in testimony, then you are at liberty to disregard the whole or any part of that witness's testimony which you do not deem entitled to credit. You will give to the testimony of such and each witness, just that weight and value you believe it is entitled to receive.

"It is your duty as the finders of the facts to take and consider these instructions as a whole and not to separate or single out any particular part and depend upon that alone.

"If counsel in their argument or in the progress of the trial of the case have made any statements of the evidence which are not in accordance with your recollection of the evidence, or if I have made any statements which are not in accordance with your recollection of the evidence, it is your duty to depend upon your recollection of what the evidence is because you are the ultimate finders of the facts and you must depend upon your own memory as to what the evidence is. You are to consider the evidence as given from the witness stand here and not consider outside matter that was not brought out in evidence in the trial in the case."

The defendants objected to the instructions read by the court to the jury as follows:

"Mr. Brewster: We except to the instruction that if the Government is entitled to recover at all, they are entitled to recover for interest at six per cent on these items, and we except to that instruction and suggest the instruction that the Government is in no event entitled to interest.

The Court: All right.

Mr. Brewster: We request an instruction that the payment of taxes voluntarily and without protest and the payment of them over a number of years, would constitute a consent on the part of the party paying taxes and would amount to a waiver of any objections that this Indian woman might have had to the issuance of the fee patent and that it was a ratification of the issuance of this patent.

We request an instruction that the plaintiff is not entitled to recover for any taxes paid during the years between the [fol. 51] years when the fee simple patent was issued and until it was actually cancelled by order of the Secretary of the Interior.

The Court: Well, I can't give any instructions like that.

Mr. Brewster: We except to your refusal to give it. We request an instruction that when M-Ko-Quah-Wah made application for the patent for this additional twenty acres, she automatically became a citizen of the United States and ceased to be a ward.

The Court: No, I can't do that.

Mr. Brewster: To which we except, and we request an instruction that the Secretary of the Interior, or Competency Commission, no, that the Secretary of the Interior made an order that M-Ko-Quah-Wah was capable of managing her own affairs and that that order has never been cancelled.

The Court: No.

Mr. Brewster: We except to that. We except to that instruction where it was stated that the administrator was bound to pay these taxes and return it to them.

Mr. Hunt: It was charged as expense on the account, and also, your Honor, it was charged as an expense of the estate on the account, and there is no testimony that he was going to turn it to her.

Mr. Alexander: It is not binding upon the Government your Honor.

Mr. Brewster: We except to the instruction with reference to what the Kansas Statutes provide with respect to interest charges on delinquent taxes, etc. We except and object to that instruction with reference to protest that the Court used. That is, it is not necessary to show that the taxes have been paid under protest, and we except to the instruction as to what constitutes a voluntary payment of taxes, more specifically that the party must have paid them with knowledge of her rights and not because of fear. I want to except to the instruction or the statement in the instruction that the evidence shows that she did not apply for, or did not consent to the issuance of the fee simple patent.

The Court: All right.

Mr. Hunt: Has your Honor passed on that?

[fol. 52] The Court: Yes, he has just taken exception to what I have already given.

Mr. Brewster (continuing): And on all those I requested and he refused to give, we except to the ruling."

Said exceptions were allowed.

The defendants prior to said charge and to the argument of counsel presented to the court and requested the court to give to the jury the following instructions:

INSTRUCTIONS REQUESTED BY DEFENDANTS

I

You are hereby instructed that under the evidence the plaintiff has failed to establish a cause of action against the defendants. You are, therefore, instructed to find for the defendants.

If the court does not give this instruction, then in the alternative each of the defendants request the court to give the jury the following instructions:

II

You are instructed that in no event is the plaintiff entitled to recover interest on any of the taxes paid. Therefore, if your verdict should be for the plaintiff, you are instructed not to allow any interest.

III

You are instructed that if you find from the evidence that the taxes sought to be recovered by the plaintiff were paid voluntarily and without protest by and on behalf of M-Ko-Quah-Wah, then and in that event you are instructed that your verdict must be for the defendants.

IV

You are instructed that if the payment of these taxes was made voluntarily and without protest, that would constitute consent and acquiescence of M-Ko-Quah-Wah to the issuance of the fee patent, and furthermore that would constitute a waiver of any objections said Indian might have made to the issuance of the fee patent and was a ratification of the issuance of the fee simple patent. Therefore, if you find that said payments were made voluntarily and without protest, you are instructed to find for the defendants.

[fol. 53]

V

You are instructed that the plaintiff is not entitled to recover for any of the taxes paid for the years between the date of the issuance of the fee simple patent and the order of cancellation by the Secretary of the Interior.

VII

You are instructed that if you find from the evidence that M-Ko-Quah-Wah or the plaintiff did not file any claim with the officials of Jackson County, Kansas, on or before May 15, 1933, under the provisions of the Kansas Cash Basis Law, which is Chapter 319 of the Laws of 1933, then and in that event you are instructed that the plaintiff is not entitled to recover any taxes paid prior to May 15, 1933. This, however, does not mean the plaintiff is entitled to recover payments made after May 15, 1933, if under some other instruction you find the plaintiff is not entitled to recover.

VIII

An instruction that if M-Ko-Quah-Wah made application for the patent to the twenty acres, when such patent was issued, she automatically became a citizen and ceased to be a ward of the government.

IX

You are instructed that the Secretary of the Interior made an order that M-Ko-Quah-Wah was capable of managing her own affairs, which order has never been cancelled.

The court refused to give all of said instructions as requested by the defendants.

The defendants, in the presence of the jury and before they retired to deliberate upon their verdict, excepted to the ruling of the court refusing to give and read to the jury the instructions requested by the defendants. The defendants' objections were as hereinbefore set out on pages 28 to 30 and as follows:

"Mr. Brewster (continuing): And on all those I requested and he refused to give, we except to the ruling."

The jury thereupon retired to consider their verdict.

[fols. 54-55] Thereupon, on December 17, 1937, the jury rendered a verdict for the plaintiff and against the defendant, which, omitting caption, is as follows:

VERDICT

"We, the jury in the above-entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess its damages at \$3277.49.

Bert Metzger, Foreman."

Thereupon, defendants by their counsel on December 18, 1937, moved for a new trial, which motion omitting caption and formal parts is as follows:

DEFENDANTS' MOTION FOR NEW TRIAL

"Comes now the defendants in the above-entitled cause and move this court for an order setting aside the verdict and judgment if any herein and granting a new trial for the following reasons:

1. Erroneous rulings and instructions of the court.
2. That the verdict is in whole or in part contrary to the evidence.
3. The court held that the Kansas cash basis law did not apply in this case.
4. The evidence does not show that these taxes were paid by or on behalf of M-Ko-Quah-Wah.
5. The court held that Title 25, U. S. C. A., Sec. 352a is retroactive and that plaintiff was entitled to recover taxes paid prior to passage of the law and prior to the cancellation of the patent.
6. The verdict is contrary to law.
7. The court erred in instructing the jury that plaintiff was entitled to recover interest.
8. The evidence shows that the taxes were paid voluntarily and without protest.
9. The court erred in instructing the jury that M-Ko-Quah-Wah did not consent to the issuance of the patent.
10. The evidence does not show that the taxes were paid by money belonging to M-Ko-Quah-Wah."

[fol. 56] Said motion for a new trial was denied by the court.

[fols. 57-60] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS ON STIPULATION—Filed
June 8, 1938

The parties to the above-entitled action, through their respective counsel of record, having stipulated in writing that the proposed bill of exceptions, presented herewith, consisting of pages numbered 1 to 36, inclusive, contains a true statement of the proceedings had upon the trial of the cause, and contains all the material evidence produced at the trial of said cause, and the same having been duly considered by the judge of this court, who presided at the trial of said cause, and the same appearing to be in all respects proper,

It Is Ordered and Certified that the above and foregoing instrument, consisting of pages 1 to 36, inclusive, be and the same hereby is approved, settled, and allowed as the bill of exceptions in said cause.

Dated this 8th day of June, 1938.

Richard J. Hopkins, District Judge.

[fol. 61] ORDER OF SUBMISSION—September 14, 1938

This cause came on to be heard and was argued by counsel, George M. Brewster, Esquire, appearing for appellant, Raymond M. Kell, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SEPTEMBER
TERM, 1938

No. 1728

Geo. M. Brewster (Warden L. Noe, Floyd W. Hobbs, John L. Hunt with him on brief) for appellant.

Raymond M. Kell, Attorney, Department of Justice
(Charles E. Collett, Acting Assistant Attorney General,

Summerfield S. Alexander, U. S. Attorney, Oscar Provost, Attorney, Department of Justice, with him on brief) for appellee.

Before Phillips, Bratton and Williams, Circuit Judges

OPINION—December 10, 1938

WILLIAMS, Circuit Judge, delivered the opinion of the court:

The United States of America instituted this action under direction of its Attorney General, in accordance with Section 24 of the Judicial Code as amended (28 U. S. C. A. 41 [1]), in the District Court of the United States for the District of Kansas, in behalf of M-Ko-Quah-Wah, its restricted or incompetent Indian ward, of the Pottawatomie Indians, hereinafter referred to as allottee, against the Board of County Commissioners of Jackson County, Kansas, to recover taxes collected by said county during the years 1919-1933, inclusive, upon land which had been allotted to said Indian under the General Allotment Act of February 8, 1887.

The trial court submitted the disputed questions of fact to the jury, a verdict being returned in favor of the government. [fol. 62] The judgment of the trial court on said verdict was rendered on December 17, 1937. Petition for appeal was filed and allowed March 15, 1938, jurisdiction of this court being invoked under Section 128 of the Judicial Code as amended, (28 U. S. C. A., Section 225a, page 294).

By Treaty of June 5 and 17, 1846, (9 Stat. 853), the United States of America, for a consideration, granted to the Pottawatomie Tribe of Indians a tract of land within the territory now embraced within that of the state of Kansas "as their land and home forever."¹

¹9 Stat. 853: Indian Affairs, Laws and Treaties, Vol. II, 2d Edition, p. 557:

"Article 2. The said tribe of Indians hereby agree to sell and cede, and do hereby sell and cede, to the United States, all the lands to which they have claim of any kind whatsoever, and especially the tracts or parcels of land ceded to them by the treaty of Chicago, and subsequent thereto, and now, in whole or in part, possessed by their people, lying and being north of the river Missouri, and embraced in the limits of the Territory of Iowa; and also all that tract of

Under Treaty of November 15, 1861, 12 Stat. 1191, Indian Affairs, Laws and Treaties, by Kappler, Vol. II, 2d Edition, page 824, said reservation was to be surveyed and separate tracts therefrom assigned to those members who desired to take such tracts and who relinquished their rights to the [fol. 63] lands held in common by the tribe, and there was to be issued to each of such members a certificate establishing his or her exclusive right to the exclusive possession of the tract assigned to and set apart to him or her "for the

country lying and being on or near the Osage River, and west of the State of Missouri; it being understood that these cessions are not to affect the title of said Indians to any grants or reservations made to them by former treaties.

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"Article 4. The United States agree to grant to the said united tribes of Indians possession and title to a tract or parcel of land containing five hundred and seventy-six thousand acres, being thirty miles square, and being the eastern part of the lands ceded to the United States by the Kansas tribe of Indians, by treaty concluded on the 14th day of January, and ratified on the 15th of April of the present year, lying adjoining the Shawnees on the south, and the Delawares and Shawnees on the east, on both sides of the Kansas River, and to guarantee the full and complete possession of the same to the Pottowatomie Nation, parties to this treaty, as their land and home, forever; which they are to pay the United States the sum of eighty-seven thousand dollars, to be deducted from the gross sum promised to them in the 3d article of this treaty.

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"Article 6. The said tribes of Indians agree to remove to their new homes on the Kansas River, within two years from the ratification of this treaty; and further agree to set apart the sum of twenty thousand dollars to the upper bands, (being five dollars per head), to pay the actual expenses of removing; and the sum of forty thousand dollars for all the bands, as subsistence money, for the first twelve months after their arrival at their new homes; to be paid to them so soon as their arrival at their new homes is made known to the Government, and convenient arrangements can be

perpetual and exclusive use and benefit of such assignees and their heirs," and "until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided."²

made to pay the same between the parties to this treaty; the aforesaid sums to be also deducted from the aggregate sum granted by the United States to said tribes of Indians by the 3d article of this treaty.

"Article 8. It is agreed upon by the parties to this treaty that, after the removal of the Pottowautomie Nation to the Kansas Country, the annual interest of their 'improvement fund' shall be paid out promptly and fully, for their benefit at their new homes. If, however, at any time thereafter, the President of the United States shall be of opinion that it would be advantageous to the Pottowautomie Nation, and they should request the same to be done, to pay them the interest of said money in lieu of the employment of persons or purchase of machines or implements, he is hereby authorized to pay the same, or any part thereof, in money, as their annuities are paid at the time of the general payments of annuities. It is also agreed that, after the expiration of two years from the ratification of this treaty, the school-fund of the Pottowautomies shall be expended entirely in their own country, unless their people, in council, should, at any time, express a desire to have any part of the same expended in a different manner."

"Article 1. The Pottawatomie tribe of Indians believing that it will contribute to the civilization of their people to dispose of a portion of their present reservation in Kansas, consisting of five hundred and seventy-six thousand acres, which was acquired by them for the sum of \$87,000, by the fourth article of the treaty between the United States and the said Pottawatomies, proclaimed by the President of the United States on the 23d day of July, 1846, and to allot lands in severalty to those of said tribe who have adopted the

[fol. 64] By provisions of Treaty of March 29, 1866, with said tribe (14 Stat. 763; Indian Affairs, Laws and Treaties,

customs of the whites and desire to have separate tracts assigned to them, and to assign a portion of said reserve to those of the tribe who prefer to hold their lands in common; it is therefore agreed by the parties hereto that the Commissioner of Indian Affairs shall cause the whole of said reservation to be surveyed in the same manner as the public lands are surveyed, the expense whereof shall be paid out of the sales of lands hereinafter provided for, and the quantity of land hereinafter provided to be set apart to those of the tribe who desire to take their lands in severalty, and the quantity hereinafter provided to be set apart for the rest of the tribe in common; and the remainder of the land, after the special reservations hereinafter provided for shall have been made, to be sold for the benefit of said tribe.


“Article 2. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring lands in severalty; and of those desiring lands in common, designating chiefs and head-men, respectively; each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind. And thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs, to each chief at the signing of the treaty, one section; to each head-man, one half section; to each other head of a family, one quarter section; and to each other person eighty acres of land, to include, in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being

by Kappler; Vol. II, 2d Edition, p. 916), an amendment to the prior treaties was incorporated so as to extend the provisions thereof to the more prudent and intelligent mem-

members of the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. And on receipt of such certificates, the person to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.

“Article 3. At any time hereafter when the President of the United States shall become satisfied that any adults, being males and heads of families, who may be allottees, under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them by patent in fee-simple, with power of alienation; and may, at the same time, cause to be paid to them, in cash or in the bonds of the United States, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: Provided, That, before making any such application to the President, they shall appear in open court in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests, that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.”

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bers of said tribe, not to be confined to males and heads of families of said tribe, without distinction of sex.³

Said allottee, a fullblood Pottawatomie Indian who did not speak English, on land on which the taxes here in controversy were collected and which having been allotted to her on May 31, 1893, and a trust patent thereto issued on [fol. 65] August 15, 1893, pursuant to the General Allotment Act of February 8, 1887,⁴ and by executive orders dated July 30, 1918, and April 16, 1928, the trust period as provided and stipulated in said patent and said Act of Feb-

³Article 1. The beneficial provisions in behalf of the more prudent and intelligent members of said tribe, contained in the third article of the amended treaty above recited, shall not hereafter be confined to males and heads of families, but the same shall be and are hereby extended to all adult persons of said tribe, without distinction of sex, whether such persons are or shall be heads of families or otherwise, in the same manner, to the same extent, and upon the same terms, conditions, and stipulations as are contained in said third article of said treaty with reference to 'males and heads of families'."

⁴Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. A. Section 348; Kappeler's Indian Affairs, Laws and Treaties, Vol. I, 33, 34, 35, provides as follows:

"Upon the approval of the allotments provided for in sections 331 to 334, inclusive, and 336 by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; Provided, That the President of the United States may in any case in his discretion extend the period * * *"

ruary 8, 1887, was extended for an additional 20 years, to-wit, until 1938,⁵ such trust period later being extended indefinitely by Act of Congress, June 18, 1934. (Wheeler-Howard Act), c. 576, Section 2, 48 Stat. 984.

According to a finding by a competency commission appointed by the Secretary of the Interior,⁶ said allottee and her husband were considered "very competent people." The President of the United States issued a fee-simple patent dated April 17, 1918. The application for the issuance of said fee-simple patent submitted to the Secretary of the Interior was not signed by her, the competency commission stating, "This allottee declined to sign an application," in fact, refused to sign such application—not desiring that [fol. 66] a fee-simple patent be issued to her. Such issuance was done altogether without her permission, and upon its

⁵Act of May 8, 1906, c. 2348, 34 Stat. 182, 25 U. S. C. A. Section 349, provides:

"At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in Section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Territory in which they may reside: * * * and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed * * *"

⁶Act of February 26, 1927, c. 214, 44 Stat. 1247, as amended by the Act of February 21, 1931, c. 271, 46 Stat. 1205, 25 U. S. C. A. Section 352a, provides:

"The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee, or by his heirs: Provided, That the patentee has not mortgaged or sold any part of the land described in such patent: Provided also, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent has never been issued."

receipt she requested her husband to send it back to Washington, as her husband "did the business for her," handled the operation and management of her lands, the employment of farm help, the leasing of pasture lands, and the collection of all income from the farm. During his lifetime, she did not transact any business for herself, and did not have a separate or joint bank account.

After her husband's death about 1927, a banker in a bank at which her husband had carried the bank account opened the account in her name. The husband had not possessed any land at the time of his marriage to said allottee, and except for an inheritance of land, he had no substantial source of income beyond that received from the operation and management of allottee's land.

The allottee had advised her husband to pay the taxes "for fear that if we didn't we would lose the land," and after her husband's death she advised the banker for the same reason to pay the taxes.

The patent was recorded on April 7, 1930, by one of the officers of the bank, same not being done under the direction, knowledge, permission or consent of the allottee.

The land was placed on the county tax rolls for the years 1919-1934, inclusive.

The General Allotment Act and the terms of the patent issued pursuant thereto, which by extensions is still in force, created an immunity from taxation under the laws of the state, such exemption being a present vested right in the allottee which continued as binding upon the state and its subdivisions and which could not be taken away from the allottee by the mere issuance of the fee patent during the trust period without her consent. Board of County Comm. of Caddo County v. United States, (10th Cir.), 87 Fed. (2d) 55, 56, and cases there cited.

The Treaty of 1861 provided that the land should be exempt from taxation until otherwise provided by law and for the termination of the exemption upon the issuance of a patent in fee simple, such patent to be issued only upon request of the allottee. Such fee simple patent was issued not only without the request of the allottee, but also over her protest. Congress has not by law provided for the [fol 67] termination of the exemption. On the contrary, by the General Allotment Act, such exemption extended until the termination of the trust period, which was duly extended until 1938, and later for an indefinite period by

Act of June 18, 1934.⁷ Caddo County case, *supra*, (87 Fed. [2d] 55), and cases therein cited; Choate v. Trapp, 224 U. S. 665; and Ward v. Love County, 253 U. S. 17.

In Ward v. Love County, *supra*, it is said (at pages 23 and 24):

"As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well settled rule that 'money got through imposition' may be recovered back; and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' * * * To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be *in contravention of the Fourteenth Amendment, which binds the county as an agency of the State.*" (Italics supplied.)

The land was immune from the assessments from taxation, the same being void.⁸ The findings and judgment are supported by substantial evidence.

⁷ "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress." (June 18, 1934, c. 576, Sec. 2, 48 Stat. 984.)

⁸ Choate v. Trapp, 224 U. S. 665; Ward v. Love County, 253 U. S. 17; Board of Com'rs of Caddo County, Okl. v. United States, (10th Cir.), 87 Fed. (2d) 55, 56; Board of Com'rs of Tulsa County, Okl. v. United States, (10th Cir.), 94 Fed. (2d) 450; United States v. Benewah County, (9th Cir.), 290 Fed. 628; United States v. Nez Perce County, Idaho, (9th Cir.), 95 Fed. (2d) 232; United States v. Lewis County, Idaho, (9th Cir.), 95 Fed. (2d) 236; Morrow v. United States, (8th Cir.), 243 Fed. 854; United States v. Glacier County, (D. C. Mont., 1936), 17 Fed. Supp. 411; United States v. Board of County Com'rs., (D. C. N. D. Okla.), 13 Fed. Supp. 641; United States v. Dewey County, S. D., (D. C. S. D., 1926), 14 Fed. (2d) 784; United States v. Board of Com'rs, (D. C., W. D., Okla.), 6 Fed. Supp. 401; United States v. Chehalis County, (D. C., Wash.), 217 Fed. 281.

Section 284 (Judicial Code, Section 177, as-amended), 28 U. S. C. A. page 119, provides that no interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered against the United States for any internal revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or any sum which was excessive or in any manner wrongfully collected, under the internal revenue laws.

Under the Fifth Amendment to the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation, a claimant would have been entitled to just compensation, by way of recompense, for the money wrongfully taken. The claim here is founded on the protection of the Fourteenth Amendment. (*Ward v. Love County*, supra.) In the *Phelps* case, 274 U. S. 341, where the property was taken before its value was ascertained or paid, it was held that judgment rendered in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation, and that said Section 177, supra, does not prohibit the inclusion of the additional amount for which petitioner contends in order to fully compensate the claimant, and that it was not a claim for interest within the purpose or intention of said Section 177; Acts of Congress to be construed and applied in harmony with and not to thwart the purpose of the Constitution, the government's obligation being to put the owners in as good position pecuniarily as if the use of their property had not been taken, they being entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking.

In *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, it is stated that on May 23, 1919, the United States, under authority of Act of Congress approved August 10, 1917, c. 53, 40 Stat. 276, which authorized the President, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support and maintenance of the Army or Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies, and to ascertain and pay a just compensation therefor, where the President requisitioned

and took possession of certain land to provide storage facilities for supplies necessary to the support of the Army and other uses connected with the public defense, it was [fol. 69] there held in the absence of a stipulation to pay interest or a statute allowing it, none can be recovered against the United States upon unpaid accounts or claims, and that under the act under which the property was requisitioned from the railroad company for the public use on payment of just compensation, where no provision was made in respect of interest, just compensation being provided for by the Constitution, such right cannot be taken away by statute, the ascertainment being a judicial function, and that the compensation to which the owner was entitled is the full and perfect equivalent of the property taken, it resting upon equitable principles, and meaning substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. The United States claimed in effect that the owner was entitled to no more than the value of the land, as of date of taking, to be paid at a later time, when ascertained, the owner being deprived of the land and its use since the taking, May 23, 1919. In the opinion it is said:

"The owner's right does not depend on contract, express or implied. A promise to pay is not necessary. None is alleged: . . . The only question here is whether payment at a subsequent date of the value of the land as of the date of taking possession is sufficient to constitute just compensation. . . .

"The case of *United States v. Rogers*, 255 U. S. 163, is a condemnation case, and it was held that the owner was entitled as a part of the just compensation to interest on the confirmed award of the commissioners from the time when the United States took possession. The land was situated in New Mexico, and the proceedings were had under the Conformity Act of August 1, 1888, c. 728, 25 Stat. 337. Interest was allowed, not by virtue of state statute, but as constituting a part of the just compensation safeguarded by the Constitution. Speaking for the court, Mr. Justice Day said: 'Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property.'

" . . . the owner's right to just compensation cannot be made to depend upon state statutory provisions. The

trial, beginning at the bottom of page 15 of the record, and continuing over through page 16.

[fol. 82] The journal entry overruling defendant's motion for new trial on page 17.

Assignment of Errors I on page 19; Assignment of Errors III on pages 19-20; all of the rest of page 20; first paragraph on page 21, and Assignment of Errors X and XI on page 21.

Orders extending time to prepare and file bill of exceptions as appearing on page 22.

Paragraph 1 of defendant's amendments to assignment of errors, appearing on page 23.

Paragraphs 4 and 7 of defendant's amendments to assignment of errors, appearing on pages 24 and 25.

The first paragraph on page 26 of the record.

The last line of page 54, all of page 55 and the first paragraph on page 56.

All of the journal entry overruling defendant's motion for new trial, as set out on page 56, except the statement at the heading thereof that "said motion for new trial was denied by the court."

All of the stipulation as to the correctness of bill of exceptions, beginning at the bottom of page 56, and concluding on page 57.

All of stipulation for transcript of record, beginning at bottom of page 57, all of page 58, and all of page 59.

The foregoing stipulation is entered into by and between the parties in accordance with the provisions of Paragraph 8 of Rule No. 38 of the Supreme Court of the United States.

Thomas M. Lillard, Attorney for Petitioner. Robert
H. Jackson, Solicitor General.

May, 1939.

[fol. 83] [File endorsement omitted.]

[fol. 84] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 17, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Thomas M. Lillard. File No. 43,205, U. S. Circuit Court of Appeals, Tenth Circuit, Term No. 14. The Board of County Commissioners of the County of Jackson, in the State of Kansas, etc., Petitioner, vs. The United States of America, etc. Petition for a writ of certiorari and exhibit thereto. Filed March 3, 1939. Term No. 14, O. T., 1939.

(2278)

Constitution safeguards the right * * *. The rule above referred to that in the absence of agreement to pay or statute allowing it the United States will not be held liable for [fol. 70] interest on unpaid accounts and claims, does not apply here. The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. * * * he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. The legal rate of interest, as established by the South Carolina statute was applied in this case. This was a 'palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain; namely, of making "just compensation" for the land as it stands, at the time of taking.' United States v. Sargent (C. C. A., Eighth Circuit,) 162 Fed. 81, 84.

The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

The Federal Judiciary Act of 1789, Section 34, c. 20, 28 U. S. C., Section 725, provides:

"The laws of the several states, except where the *Constitution, treaties or statutes* of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States, in cases where they apply." (Italics supplied.)

In *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. Rep. 417, 82 L. ed. 787, the court held:

"Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. * * * There is no federal general common law."

Appellant complains of the failure of the trial court to subject the United States to the statutory bar of the Kansas Cash Basis Law, invoking the pronouncement in *Erie R. Co. v. Tompkins*, supra.

This being a suit by the United States government in its [fol. 71] sovereign capacity and as guardian of its Indian

wards to carry out its obligations and to protect the Indian lands which by the Federal Constitution, acts of Congress, including its treaties with Indians, and by the terms of the admission of the State of Kansas into the Union,⁹ is a field in which the federal power is both supreme and exclusive. *Worcester v. Georgia*, 6 Pet. 515.

The same contention here advanced was put forth by other counties of the State of Kansas in early cases involving attempts by the counties¹⁰ to tax Indian lands held in severalty.

In *The Kansas Indians* (the *Blue-Jacket* case), 5 Wall. 737, the court said:

"If the Indians are under the control of Congress, from necessity there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, 'but until they are clothed with the rights and bound to all the duties of citizens' they enjoy the privilege of total immunity from State taxation. There can be no question of State sovereignty in the case, as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union."

Complaint is also made as to the trial court's refusal to instruct the jury that under the Kansas Cash Basis Law, unless the appellee had filed with the Board of County Commissioners of Jackson County on May 15, 1933, a claim for

⁹ Act of Congress, Jan. 29, 1861, Vol. 7, Thorpe's American Charters, Constitutions and Organic Laws, 1492-1908, Government Printing Office, (1909).

¹⁰ *Blue Jacket, et al. v. Board of Com'rs, County of Johnson, Kansas*; 72 U. S. (5 Wall.) 737, 18 L. Ed. 667; *Yellow Beaver, et al. v. Board of Com'rs, County of Miami*, 72 U. S. (5 Wall.), 757, 18 L. Ed. 673; *Wan-Zop-E-Ah, et al. v. Board of Com'rs of County of Miami*, 72 U. S. (5 Wall.), 759, 18 L. Ed. 674.

the taxes paid prior to April 30 of that year, the appellee is not entitled to recover the taxes paid prior to that date. The [fol. 72] specific provision of the Kansas act relied upon by the appellant provides:

"* * * all claims not presented as above provided (except unliquidated claims for damages) shall be barred and shall no longer constitute a valid and existing indebtedness of the municipality." (G. S. Kansas, 1935, 10-1104.)

This is merely a statute of limitations. *Levant Consolidated Dist. v. Colby Comm. High School*, 140 Kan. 561, 38 Pac. (2d) 684. Neither a general nor specific statute of limitations is applicable in a suit of this type. *Board of County Com'rs of Osage County, Oklahoma, et al. v. United States*, (10th Cir.), 64 Fed. (2d) 775, 776; *Board of Com'rs of Caddo County, Okl. v. United States*, (10th Cir.), 87 Fed. (2d) 55, 57; *Board of County Com'rs of Tulsa County, Okl. v. United States*, (10th Cir.), 94 Fed. (2d) 450; and *McGannon v. Straightledge*, 32 Kan. 524.

Then further contention by appellant is that under the Kansas decisions a county is not liable for interest in the absence of a statute expressly providing for its allowance. *Jackson County v. Kaul*, 77 Kan. 715, 96 Pac. 45. The same is the rule in Oklahoma: *Idon v. St. Louis-S. F. Ry. Co.*, 122 Okla. 143, 251 Pac. 1032; (1927); *Brown v. Board of Education*, 148 Okla. 97, 298 Pac. 249 (1931); and *Board of County Com'rs v. City of Marlow*, 148 Okla. 126, 298 Pac. 255 (1931).

Recovery cannot be limited by state statute or decision when it would operate to deprive the United States and its Indian wards of the full restitution or compensation to which they are entitled under the Fifth or Fourteenth Amendments to the Constitution of the United States. *Ward v. Love County*, supra, page 24; and *Board of Supervisors of Mercer County, v. Cowles*, 74 U. S. (7 Wall.) 118, 19 L. Ed. 86.

The sovereign immunity of a state does not extend to its counties for they may be sued in the absence of express consent. *Lincoln County v. Luning*, 133 U. S. 529, 10 Sup. Ct. Rep. 363; *Board of Supervisors of Mercer County v. Cowles*, supra; and *Ward v. Love County*, supra.

All contentions have been examined. The judgment of the lower court should be Affirmed.

[fols. 73-74] IN UNITED STATES CIRCUIT COURT OF APPEALS
JUDGMENT—December 10, 1938

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed; and that United States of America, appellee, have and recover of and from The Board of County Commissioners of the County of Jackson, in the State of Kansas, appellant, its costs herein.

[fol. 75] IN UNITED STATES CIRCUIT COURT OF APPEALS,
TENTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed January 9, 1939

To the United States Circuit Court of Appeals of the Tenth Circuit and the Judges thereof:

Comes now The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, the appellant in the above entitled cause, and presents this its petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

[fol. 76]

I

This court failed to give proper effect to the recent decision of the United States Supreme Court in the case of *Erie R. R. Co. v. Tompkins*, 32 L. ed. 787, decided April 25, 1938, in that the proper interpretation of that case in substance holds that in matters not governed by the federal constitution or acts of Congress, the law to be applied in any case is the law of the state.

II

Failure of the District Court to leave the question of what would constitute reasonable compensation to the jury. The

Judge of the District Court instructed the jury that if they find for the plaintiff, the plaintiff is entitled to six per cent interest.

III

This court failed to give proper effect to the acts of the Secretary of the Interior and the President of the United States in issuing a fee simple patent under proper authority from Congress. In view of the peculiar wording of this peace treaty, 25 U. S. C. A. 349 did properly "otherwise provide by law" within the meaning of the provisions of said treaty, wherein it is stated " * * * Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale. * * * " (See Brief p. 27.)

IV

This court found that the plaintiff was entitled to recover.

V

This court failed to give effect to the peculiar wording of this Indian treaty. (See our brief, page 28.)

[fols. 77-78] Wherefore, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted, and that the judgment of the United States District Court, for the District of Kansas, be upon further consideration reversed.

Respectfully submitted, Warden L. Noe, Floyd W. Hobbs, John L. Hunt, George M. Brewster, Attorneys for Appellant.

CERTIFICATE OF COUNSEL

We, counsel for the above named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

John L. Hunt, Geo. M. Brewster, Attorneys for Appellant.

[File endorsement omitted.]

[fols. 79-80] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—January 23, 1939

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

(On February 3, 1939, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.)

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed May 26, 1939

It is hereby stipulated by and between counsel for the petitioner and counsel for the respondent in the above entitled case that the following portions of the transcript of the record as printed by the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit when the above case was before that Court may be omitted from the record to be printed in the Supreme Court of the United States as being not essential to a consideration of the question there presented by a petition for certiorari:

—All that part of page 6 down to the motion to make additional parties.

The motion for new trial as set out beginning on page 14, and concluding on page 15, substituting in lieu thereof the statement that "Motion for new trial was filed on December 18, 1937, and order of the court overruling the motion was filed March 25, 1938."

All of plaintiff's objections to the jurisdiction of the court to hear and determine defendant's motion for new

MICRO CARD

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